Supreme Court, U. S.
FILED
FEB 6 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1119

FILM FOLLIES, INC., an Oregon corporation,

Petitioner,

v.

HARL HAAS, individually and as District Attorney for Multnomah County, Oregon; LOUIS RHINEHART, individually and as Director of Public Safety for Multnomah County, Oregon; BRUCE BAKER, individually and as Chief of Police of the City of Portland, Oregon; and LEE JOHNSON, individually and as Attorney General of the State of Oregon,

Respondents.

On Appeal from the Court of Appeals for

State of Oregon

JURISDICTIONAL STATEMENT

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IN THE

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No

FILM FOLLIES, INC., an Oregon corporation,

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HARL HAAS, individually and as District Attorney for Multnomah County, Oregon; LOUIS RHINEHART, individually and as Director of Public Safety for Multnomah County, Oregon; BRUCE BAKER, individually and as Chief of Police of the City of Portland, Oregon; and LEE JOHNSON, individually and as Attorney General of the State of Oregon,

Respondents.

On Appeal From the Court of Appeals

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JURISDICTIONAL STATEMENT

Opinion Below

The opinion of the Court of Appeals for the State of Oregon affirming the decision of the trial court, dated August 25, 1975 is reported in 75 Or. Adv. Sh. 2932, ___P2d____(1975) and is set forth in the Appendix, infra pp. 1a.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2), this being an appeal which draws into question the validity of Oregon Law 1973, Ch. 699 on the ground that it is repugnant to the First Amendment of the Constitution of the United States.

The appellant filed a request for declaratory judgment requesting that the trial court enjoin enforcement of the statute. The trial court found against the plaintiff-appellant and dismissed the complaint. Appellant appealed to the Court of Appeals for the State of Oregon which affirmed the trial court decision

on August 25, 1975. Appellant then sought review of the decision of the Court of Appeals in the Supreme Court of Oregon. The Supreme Court of Oregon denied review on November 12, 1975. Notice of appeal was filed within ninety days of that date.

In the event that the Court does not consider appeal, the proper mode of review, appellant requests that the papers whereupon this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. §2103.

QUESTIONS PRESENTED

Is the Oregon obscenity statute in violation of the First and Fourteenth Amendments of the United States Constitution in that it is vague and overbroad?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments of the Constitution of the United States.

Also, the case involves Oregon Laws 1973, Ch. 699, (so cited because it has not yet been compiled in the Oregon Revised Statutes):

> "Section 4.(1) A person commits the crime of disseminating obscene material if he knowingly makes, exhibits, sells, delivers or provides, or offers or agrees to make, exhibit, sell, deliver or provide, or has in his possession with intent to exhibit, sell, deliver or provide any obscene writing, picture, motion picture, films, slides, drawings or other visual reproduction.
> (2) As used in subsection (1) of this section, matter is obscene if:
> (a) It depicts or describes in a patently offensive manner sadomasochistic abuse or sexual conduct;
> (b) The average person applying contemporary state standard would find the work, taken as a whole, appeals to the prurient interest in sex; and
> (c) Taken as a whole, it lacks serious literary, artistic, political or scientific value."

and:

> ORS 167.060(10): "(10) Sexual conduct means human masturbation, sexual intercourse, or

> any touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification."

STATEMENT OF THE CASE

This case involves a suit for declaratory relief brought by the Plaintiff-Appellant corporation, a bookstore engaged in the distribution of "adult" materials, against local law enforcement authorities to enjoin the enforcement of Oregon Laws 1973, Ch. 699 and ORS 167.060(10).

In its pleadings, Plaintiff alleged that it operated a bookstore in Portland which dealt with materials which appeared to come within the definitions of sexual conduct as defined in the Oregon Statutes. As part of its business, Plaintiff ordered for sale to the general public books and photographs which depicted, by representation and description, nudity of

both men and women. Some of the material depicted touching of the buttocks by both males and females by the person pictured in an act of apparent sexual stimulation. Some of the material offered for sale depicted the touching of female breasts by both the man and woman pictured and others, both male and female, in an act of apparent sexual stimulation and gratification. All of the defendants named in the complaint have promised to enforce the provision of the obscenity statutes in Multnomah County, the location of the Plaintiff's business. Plaintiff will suffer a financial loss from the existence and threatened enforcement of the statute.

The matter was submitted to the Circuit Court of the State of Oregon for Multnomah County, the trial department, on the pleadings, and the Circuit Court declared the statute constitutional and dismissed the Complaint. Plaintiff-

Appellant appealed to the Court of Appeals for the State of Oregon which affirmed the trial court without specifically addressing the problem raised.

HOW THE FEDERAL QUESTIONS WERE RAISED BELOW

One of the alleged grounds of unconstitutionality Appellant asserted in its complaint for declaratory relief seeking the enjoining of the statute was as follows:

> "The aforementioned statutes are invalid and unconstitutional in the following particulars:
> (1) The statutory scheme is overbroad and vague in that ORS 167.060(10) defines as prohibited materials, types of material which are constitutionally protected and not subject to suppression under the First Amendment, and the Fifth Amendment of the United States Constitution as applied to the states through the Fourteenth Amendment. . ." (Complaint, Page 3, Paragraph V).

The trial court found against the Plaintiff on this ground and the Court of Appeals affirmed the trial court as follows:

"Plaintiff first asserts that Chapter 699[1] and the related definition contained in ORS 167.060(10)[2] are vague and overbroad and thus violate the First and Fourteenth Amendments to the United States Constitution.[3] Plaintiff also asserts that Oregon Laws 1973, Ch. 699, violates the "log-rolling prohibitions of Art. IV, §20 of the Oregon Constitution. We have recently ruled to the contrary in both respects. State v. Liles, 75 Adv. Sh. 2614, ___Or. App.____, ____P2d____(1975)"

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

This case involves a determination of whether or not ORS 167.060(10) in defining sexual conduct is a broader definition of those matters which may be prohibited and controlled as obscene than is permitted under the First Amendment of the United States Constitution applied to the states through the Fourteenth Amendment.

The question presented is of great concern to the Plaintiff and citizens of Oregon. The definition of sexual conduct in ORS 167.060(10) permit the State of

Oregon to regulate certain materials which are beyond the definition of that material which may be regulated pursuant to obscenity prosecutions when dissemination to adults is involved. In Jenkins v. Georgia, ____U.S.____, 94 S.Ct.____, 41 Law Ed. 2d 642 (1974), the Court gave the following examples of what a state statute could define for regulation of sexual conduct:

> "These examples include representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, and representations or descriptions of masturbations, excretory functions, lewd exhibition of genitals."

The Oregon Statute appears to regulate certain depictions of nudity and therefore goes beyond the clear limitations of Jenkins.

CONCLUSION

For the foregoing reasons, probable

jurisdiction should be noted.

Respectfully submitted

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APPENDIX A

APPENDIX A

IN THE COURT OF APPEALS OF THE

STATE OF OREGON

FILM FOLLIES, INC., Appellant,	)	
v.	)	No. 314
HAAS ET AL, Respondents.	)	

(August 25, 1975)

Appeal from Circuit Court,
Multnomah County

Before: SCHWAB, Chief Judge, and LANGTRY and FOLEY, Judges

AFFIRMED

FOLEY, J.

In a suit for declaratory relief plaintiff contended that Oregon Laws 1973, Ch. 699 (hereafter Chapter 699), ORS 167.060(10), and ORS 167.085 violate the First and Fifth Amendments to the United States Constitution, as applied to the states through the Fourteenth Amendment, as well as Art I, §8 and Art IV, §20 of the Oregon Constitution. Plaintiff asked that defendants be enjoined from enforcing the

statutes. The circuit court declared the statutes constitutional and dismissed the complaint. Plaintiff appeals. ORS 28.070.

Plaintiff first asserts that Chapter 669[1] and the regulated definition contained in ORS 167.060(10)[2] are vague and overbroad and thus violate the First and Fourteenth Amendments to the United States Constitution.[3] Plaintiff also asserts that Oregon Laws 1973, ch 699, violates the "log-rolling" prohibitions of Art IV, §20 of the Oregon Constitution. We have recently ruled to the contrary in both respects. State v. Liles, 75 Adv Sh 2614, ___Or App ___, 537 P2d 1182 (1975).

---

[1] Oregon Laws 1973, ch 699 (so cited because it has not yet been compiled in Oregon Revised Statutes), provides:

"Section 1. Sections 2 to 4 of this Act are added to and made a part of ORS 167.060 to 167.095.

"Section 2. As used in this 1973 Act unless the context requires otherwise:

"(1) 'Live public show' means a public show in which human beings,

animals, or both appear bodily before spectators or customers.

"(2) 'Public show' means any entertainment or exhibition advertised or in some other fashion held out to be accessible to the public or member of a club, whether or not an admission or other charge is levied or collected and whether or not minors are admitted or excluded.

"Section 3. (1) It is unlawful for any person to knowingly engage in sado-masochistic abuse or sexual conduct in a live public show.

"(2) Violation of subsection (1) of this section is a Class A misdemeanor.

"(3) It is unlawful for any person to knowingly direct, manage, finance or present a live public show in which the participants engage in sado-masochistic abuse or sexual conduct.

"(4) Violation of subsection (3) of this section is a Class C felony.

"Section 4. (1) A person commits the crime of disseminating obscene material if he knowingly makes, exhibits, sells, delivers or provides, or offers or agrees to make, exhibit, sell, deliver or provide, or has in his possession with intent to exhibit, sell, deliver or provide any obscene writing, picture, motion picture, films, slides, drawings, or other visual reproduction.

"(2) As used in subsection (1) of this section, matter is obscene if:

"(a) It depicts or described in a patently offensive manner sado-masochistic abuse or sexual conduct;

"(b) The average person applying contemporary state standards would find the work, taken as a whole, appeals to the prurient interest in sex; and

"(c) Taken as a whole, it lacks serious literary, artistic, political or scientific value.

"(3) In any prosecution for a violation of this section, it shall be relevant on the issue of knowledge to prove the advertising, publicity, promotion, method of handling or labeling of the matter, including any statement on the cover or back of any book or magazine.

"(4) No employe is liable to prosecution under this section or under any city or home-rule county ordinance for exhibiting or possessing with intent to exhibit any obscene motion picture provided the employe is acting within the scope of his regular employment at a showing open to the public.

"(5) As used in this section, 'employe' means an employe as defined in subsection (3) of ORS 167.075.

"(6) Disseminating obscene material is a Class A misdemeanor.

"Section 5. ORS 167.002 is amended to read:

"167.002. As used in ORS 167.002 to 167.027, unless the context requires otherwise:

"(1) 'Place of prostitution' means any place where prostitution is practiced.

"(2) 'Prostitute' means a male or a female person who engages in sexual conduct or sexual contact for a fee.

"(3) 'Prostitution enterprise' means an arrangement whereby two or more prostitutes are organized to conduct prostitution activities.

"(4) 'Sexual conduct' means sexual intercourse or deviate sexual intercourse.

"(5) 'Sexual contact' means any touching of the sexual organs or other intimate parts of a person not married to the actor for the purpose of arousing or gratifying the sexual desire of either party.

"Section 6. ORS 167.007 is amended to read:

"167.007. (1) A person commits the crime of prostitution if:

"(a) He engages in or offers or agrees to engage in sexual conduct or sexual contact in return for a fee(.); or

"(b) He pays or offers or agrees to pay a fee to engage in sexual conduct or sexual contact.

"(2) Prostitution is a Class A misdemeanor." (Brackets in original)

---

[2]ORS 167.060(10) provides:

"Sexual conduct" means human masturbation, sexual intercourse, or any touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification."

---

[3]Although plaintiff contends that Chapter 699 is overbroad and thus violates the Due Process Clause of the Fifth Amendment we assume, since this case is based on state action, that the intended reference is to the Due Process Clause of the Fourteenth Amendment.

Two issues not raised in State v. Liles, supra, remain. Plaintiff contends that ORS 167.085(3) violates the First and Fourteenth Amendments in that it places upon the defendant in an obscenity case the burden or proving the material in question has serious value and therefore is not obscene.

ORS 167.085 provides, in pertinent part:

> "In any prosecution under ORS 167.065 to 167.080, it is an affirmative defense for the defendant to prove:
>
> " * * * * *
>
> "(3) That the defendant was charged with the sale, showing, exhibition or display of an item, those portions of which might otherwise be contraband forming merely an incidental part of an otherwise nonoffending whole, and serving some legitimate purpose therein other than titillation.
>
> "* * * * *."

In State v. Watson, 243 Or 454, 414 P2d 337 (1966), the Oregon Supreme Court considered a similar provision in ORS

167.151(3) (repealed, Oregon Laws 1971, ch. 743, §432) which provided in reference to sections prohibiting the dissemination of obscenity:

> "In any prosecution for an offense under this section, evidence shall be admissible, as relevant to a determination of whether or not the predominant theme of the matter appeals to prurient interest, to show artistic, literary, scientific or educational merit of the matter."

The Supreme Court noted in a footnote that this provision read "as if the presence of literary merit is an affirmative defense" but the court stated that the burden "rests upon the state to prove all the necessary elements of obscenity." 243 Or at 456.[4] In light of our "duty to give an act a constitutional construction if it can be done without wrenching the meaning of words," State v. Jackson, 224 Or 337, 345, 356 P2d 495 (1960), we place a similar interpretation on ORS 167.085(3). Section 4(2) of

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[4]This position was reiterated in State v. Childs, 252 Or 91, 102, 447 P2d 304 (1968)

cert denied 394 US 931 (1969). See also, n 6, infra.

Chapter 699 describes the elements of obscenity, which the state must prove beyond a reasonable doubt. Even if ORS 167.085(3) does apply to Chapter 699,[5] the state still has the burden of proving beyond a reasonable doubt that the material is obscene.

The remaining issue is whether Art I, §8 of the Oregon Constitution provides broader protection in speech-related ares than the First Amendment to the United States Constitution. Article I, §8 provides:

> "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

---

[5]The obscenity statutes in general are included in ORS 167.060 to 167.095 and Chapter 699 provides that its obscenity provisions are "added to and made a part of ORS 167.060 to 167.095."

However, ORS 167.085 relates only to prosecutions under ORS 167.065 to 167.080, all of which, prior to the addition of Chapter 699, dealt only with the furnishing of obscenity to minors; ORS 167.085 is probably limited to such prosecutions.

Plaintiffs raised the issue of the constitutionality of ORS 167.085(3) in a separate paragraph of their complaint and had standing but failed to raise the issue whether or not it is limited to furnishing obscenity to minors. We therefore do not need to decide whether it is so limited.

In its most recent decision on the subject, State v. Childs,[6] the Oregon Supreme Court said:

> "We realize that we could construe the freedom of expression provision of the Oregon Constitution, Art. I, §8, as providing greater freedom of expression than that of the First Amendment to the United States Constitution. We do not believe there is any legal basis for such a construction." 252 Or at 99.[7]

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[6]The conviction in State v. Childs, 252 Or. 91, 447 P2d 304 (1968), cert denied 394 US 931 (1969), has subsequently been reversed through federal habeas corpus proceedings. Childs v. State of Oregon, 300 F Supp 649, 650 (D Or 1969) (holding matter not obscene), reversed 431 F2d 272 (9th Cir 1970) (holding matter to be obscene), reversed 401 US 1006 (1971).

[7] We note that the Oregon Supreme Court has since decided that certain Oregon campaign spending statutes violate Art I, §§8 and 26, of the Oregon Constitution. Based on this determination, the court found it unnecessary to decide the Federal First Amendment issues. Deras v. Myers, 75 Adv Sh 1745, ___Or___, 535 P2d 541 (1975). It is not entirely clear whether this represents a willingness to take a more expansive view of Article I, §8, than the U.S. Supreme Court takes of the First Amendment. In another recent opinion, however, our Supreme Court decided, for several reasons, to interpret Art I, §9 of the Oregon Constitution in the same manner that the United States Supreme Court interprets the Fourth Amendment to the U.S. Constitution. State v. Florance, 99 Adv Sh 1997, ___ Or ___, 527 P2d 1202 (1974)

We have already determined that Chapter 699 does not violate the First Amendment to the United States Constitution. State v. Liles, supra. In light of the court's statement in Childs, it follows that Chapter 699 does not violate Art I, §8 of the Oregon Constitution.

Affirmed.

Supreme Court, U. S.
FILED
MAY 13 1976
MICHAEL RODAK, JR., CLERK

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Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF OREGON

MOTION TO DISMISS OR AFFIRM

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Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF OREGON

MOTION TO DISMISS OR AFFIRM

OPINION BELOW

Appellant's statement is accepted.

JURISDICTION

Appellant's statement is accepted.

QUESTION PRESENTED

Whether Oregon's obscenity statute combined with its definitions is too broad and inspecific and so is in violation of the First Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Appellant's statement is accepted.

STATEMENT OF THE CASE

Appellant's statement is accepted.

REASONS FOR AFFIRMING OR DISMISSING THE APPEAL

Appellant seeks review of a decision of the Oregon Court of Appeals based upon an alleged error of Constitutional dimensions in the affirmance of a trial judge's denial of a declaratory judgment.

Appellant's request for a declaratory judgment is based on the contention that ORS 167.060(10) and Oregon Laws 1973, ch 699 §4 are overbroad and in violation of the First Amendment.

Virtually identical contentions concerning this statute's alleged unconstitutionality were recently raised by a petition for certiorari which this Court denied. *Liles v. Oregon*, —— US —— (May 3, 1976) (No. 75-983). In view of this fact, appellees respectfully urge that this appeal be dismissed for want of a substantial federal question.

Should this Court deem it appropriate to reach the

merits of this appeal, appellees respectfully urge that dismissal or summary affirmance remains the appropriate disposition.

This Court held in *Roth v. United States*, 354 US 476 (1957) that the states could prohibit obscenity because obscenity is not protected by the First Amendment to the United States Constitution. However, state obscenity statutes have been subject to attack on two grounds: First, because they are overbroad, prohibiting expression which is not obscenity but is still protected by the First Amendment; such overbroad statutes are invalid for prohibiting protected expression. Second, because they are too vague; vague statutes violate an alleged offender's due process rights under the Fourteenth Amendment to the United States Constitution since the offender is unable to ascertain what is unlawful under the statute, and because enforcement officials can be arbitrary in picking behavior for prosecution under such a statute. Vague statutes are also invalid due to the "chilling effect" they have on the exercise of expression protected by the First Amendment.

To meet both defects of overbreadth and vagueness, this Court has established and refined a standard of what is obscene and can be prohibited by the states. In *Roth, supra*, this Court held that obscenity was not protected by the First Amendment because it was utterly without redeeming social value. The test to determine whether material was obscene (which meant both that

it could, as a matter of constitutional law, be prohibited, and that it was, as a question of fact, prohibited by the state statute) was

> ". . . whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." (Footnote omitted). *Roth v. United States, supra,* 354 US at 489.

After *Roth,* many courts used "utterly without redeeming social value" as a prerequisite for a finding of obscenity and in *Memoirs v. Massachusetts,* 383 US 413 (1966), three members of this Court held the standard of what is obscenity to be that

> ". . . it must be established that (a) the dominant theme of the material taken as a whole appeals to the prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." 383 US at 418.

Many states enacted statutes adopting either the *Roth* or the *Roth-Memoirs* standard.

In *Miller v. California,* 413 US 15 (1972) this Court reassessed its previous decisions and decided that to prove material was "utterly without redeeming social value" placed too great a burden on the prosecution. *Miller, supra,* 413 US at 22. Five justices joined in reaffirming *Roth* and held the standard to be applied by the trier of fact to be

> ". . . (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest [citations omitted]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. . . ." *Miller v. California, supra* 413 US at 24.

"Sexual conduct specifically defined" could be defined by statute or construed by the state courts.

> ". . . we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. n. 6 . . .
>
> "_____
>
> "n. 6 See, *e.g.,* Oregon Laws 1971, c. 743, Art. 29, §§255-262, (which includes ORS 167.060(10)) [citations omitted] as examples of state laws directed at depiction of defined physical conduct, as opposed to expression. Other state formulations could be equally valid in this respect. In giving the Oregon and Hawaii statutes as examples, we do not wish to be understood as approving of them in all other respects nor as establishing their limits as the extent of state power.
>
> *"We do not hold, as MR. JUSTICE BRENNAN intimates, that all States other than Oregon must now enact new obscenity statutes. Other existing state statutes, as construed heretofore or hereafter, may well be adequate.* [citations omitted]." *Id.* (Emphasis supplied).

Since Oregon Laws 1973, ch 699 §4(2) adopts the *Miller* language for obscenity, there can be no question that the standards to be applied are constitutional. Appellant, therefore, must base its argument of overbreadth on the one aspect of the *Miller* requisites that

this Court did not set out verbatim, *viz,* the definition of sexual conduct which state law must include.

However, this Court *did* cite the Oregon definition with approval as an example of a valid formulation in the context of obscenity regulation per se, not obscenity regulation for minors only. With the implied approval of the statute in *Miller,* there should be no question of the constitutional adequacy of that definition.

Even if appellant did not have the hurdle of this Court's express approval in *Miller,* its argument must fail before this Court's examples of what can be defined for regulation:

> "We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain *examples* of what a state statute could define for regulation under part (b) of the standard announced in this opinion, *supra*:
>
> "(a) Patently offensive representation or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> "(b) Patently offensive representations or descriptions of masturbation, excretory functions and lewd exhibition of the genitals." *Id,* at 25. (Emphasis supplied).

These were intended as mere examples and were not meant to be exhaustive. *Hamling v. United States,* 418 US 87 (1974); *Jenkins v. Georgia,* 418 US 153 (1974). But as examples of "hard core pornography" they are directed at the same type of conduct as defined in ORS 167.060(10):

> "'Sexual conduct' means human masturbation, sexual intercourse, or any touching of the genitals, pubic area or buttocks of the human male or female,

> or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals *in an act of apparent sexual stimulation or gratification.*" (Emphasis supplied).

To be criminal, a depiction of such conduct must be "patently offensive" under Oregon Laws 1973, ch 699, §4(2). Any touching of the buttocks or female breasts must be "in an act of apparent sexual stimulation or gratification," and as such would be a "sexual act." Therefore, under Oregon's statutory scheme, touching the buttocks or female breasts must be depicted as a patently offensive sexual act. The depiction of conduct that appellant contends cannot be constitutionally regulated falls within the examples of hard core pornography given by this Court in *Miller* as examples of what *can* be regulated. The Oregon Court of Appeals so construed it.

Oregon's definition of "sexual conduct" is limited to "hard core pornography" and is valid under *Miller.* Indeed, even the course of many states with statutes embodying the older *Roth* or *Roth-Memoirs* test has been for the state's supreme court to construe their statute to be limited by *Miller* and uphold the convictions thereunder. *See Pierce v. State,* 292 Ala 473, 296 S2d 218 (1974), *cert den* 419 US 1130 (1975); *Herman v. State,* 256 Ark 840, 512 SW2d 923 (1974), *cert den* 420 US 953 (1975); *Price v. Commonwealth,* 214 Va 490, 201 SE2d 798, *cert den* 419 US 902 (1974); *People v. Kaplan,* —

Cal Rptr ——, — CA3d ——, *cert den,* 419 US 915 (1974); *Slaten v. Paris Adult Theatre I,* 231 Ga 312, 201 SE2d 456 (1973), *reh den Paris Adult Theatre I v. Slaten,* 419 US 887 (1974); *see also People v. Enskat,* 33 CA3d 900, 109 Cal Rptr 433 (1973); *State ex rel Keating v. Vixen,* 35 Ohio St 2d 215, 301 NE2d 880 (1973); *Marshall v. Ohio,* 419 US 1062 (1974); *State v. Watkins,* 262 SC 178, 203 SE2d 429 (1973), *app dis* 413 US 905 (1974); *State v. Bryant,* 285 NC 27, 203 SE2d 27 *cert den,* 419 US 974 (1974).

At least two states, Maryland and Washington, have upheld, under *Miller*, statutes that had no definition of obscenity at all: *Ebert v. Maryland Board of Censors,* 19 Md App 300 (1973), *cert den sub nom Ayre v. Maryland,* 419 US 1073 (1974); *State v. J-R Distributors, Inc.,* 82 Wash 2d 584, 512 P2d 1049 (1973), *cert den* 418 US 949 (1974).

Three state supreme courts have invalidated their state obscenity statutes under *Miller*. In *Stroud v. Indiana,* 257 Ind 201, 300 NE2d 100 (1973), the Indiana Supreme Court gave no discussion of their reason, and appears to have been under the impression that this Court had held their statute unconstitutional when it vacated and remanded for consideration in light of *Miller*. In *State v. Shreveport News Agency,* 287 S2d 464 (La 1973), the court held a *Roth*-type statute invalid under *Miller* and held it lacked the power to construe the statute to conform to *Miller*. Their reading of *Miller*

was shown to be incorrect by *Hamling, supra,* decided after *Shreveport News Agency*. Likewise, in Florida, their supreme court refused to construe a *Roth*-type statute to adopt the *Miller* standards on the grounds that it would violate due process to do so after the conviction. *Pape v. State,* 281 S2d 600 (Dist Ct App Fla 1973). That case also was decided before *Hamling* and its position rejected by this Court in that case and in the state supreme courts listed above.

In sum, Oregon's statutory scheme, as written by the Oregon legislature, complies with the *Miller* standard and is limited to "hard core pornography."

CONCLUSION

For the above reasons, this appeal should be dismissed for want of a substantial federal question, or the judgment of the Oregon Court of Appeals should be summarily affirmed.

Respectfully submitted,
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May, 1976